IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE V.RAMKUMAR

WEDNESDAY, THE 25TH JULY 2007 / 3RD SRAVANA 1929

Crl.Rev.Pet.No. 1351 of 2007()

CRA.955/2006 of ON THE FILE OF ADDL. SESSIONS JUDGE ADHOC-II, ERNAKULAM

CC.291/2000 of JUDL.MAGISTRATE OF FIRST CLASS-I, ERNAKULAM

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REVN. PETITIONER: APPELLANT/ACCUSED

ANOOP S.KUMAR, POOTHAMPALLYPARAMBU HOUSE, EAST OF MOSQUE, KOMBARA, KOCHI-18.

BY ADV. SRI.S.SUDHISH KUMAR
SRI.K.B.DAYAL

RESPONDENTS: COMPLAINANT/STATE

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1. E.J.JAMES, ELANJICKAL HOUSE, AUTOMOBILE ROAD, PALARIVATTOM, ERNAKULAM, KOCHI.

2. STATE OF KERALA, REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.K.S. SIVAKUMAR
SRI.JOHNSON ABRAHAM
SRI.S.GOPINATHAN
SRI.NELSON ABRAHAM

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY HEARD ON 16/07/2007, ALONG WITH CRRP NO. 1353 OF 2007 CRRP NO. 1362 OF 2007 CRRP NO. 1363 OF 2007 THE COURT ON 25/07/2007 PASSED THE FOLLOWING:

V. RAMKUMAR, J.

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Crl.R.P. Nos. 1351, 1353,

1362 and 1363 of 2007

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DATED: 25-07-2007

O R D E R

The common revision petitioner in these revisions who was the common accused in C.C. Nos. 291, 223, 293 and 292 respectively on the file of the J.F.C.M.-I, Ernakulam, challenges the conviction entered and the sentence passed against him concurrently by the courts below for an offence punishable under Section 138 of the Negotiable Instruments Act, 1881. The cheques involved in these cases are for a sum of Rs. 30,000/-. 2,00,000/-, 50,000, and Rs. 50,000/- respectively. The courts below concurrently found the revision petitioner guilty of the offence and sentenced him to simple imprisonment till the rising of Court and to pay a sum of Rs. 32,000/-, 2,15,000/-, 53,000/- and Rs. 53,000/- respectively by way of compensation under section 357 (3) Cr.P.C. In the event of failure to pay the compensation the courts below directed the revision petitioner to suffer simple imprisonment for a period of 15 days. It is the said conviction and sentence which are assailed in these revisions filed by the revision petitioner.

2. Adv. Sri. S. Sudhish Kumar, the learned counsel appearing for the petitioner made the following submissions before me in support of these revisions:-

3. According to the complainant examined as P.w.1, the accused borrowed a sum of Rs. 30,000/- on 23-3-1999, Rs. 1,00,000/- on 25-4-1999, Rs. 50,000/- on 16-6-1999 and another Rs. 50,000/- on 17-6-1999. He would also say that another amount of Rs. 60,000/- was given by the accused by pledging his gold ornaments with Muthoot Finance on 22-4-1999. It is opposed to normal human conduct for a person to go on advancing loans when the pre-existing loans had not been cleared. The version of the complainant that he has not given the amount by way of finance to 3rd parties is false . On the contrary, the case of the accused was that he was acting as an agent of the complainant who was doing the business of money lending and the accused was offered fiver percent as commission and for the same purpose an amount of Rs. 1,30,000/- was given to one C.T. George (DW2). P.W.1 has categorically admitted that the title deed of DW2 was handed over to the complainant. D.W.2 has also admitted that he received Rs. 1,30,000/- from the complainant and had issued a promissory note, cheque as well as title deed to the complainant. Were the accused has denied the transaction and there is no probable evidence to believe the transaction the burden of proof with regard to the existence of legally

recoverable debt shifts to the complainant and he has to prove the same before court. **(Kamalammal v. Mohanan – 2006 (3) KLT 972).** The evidence adduced by D.W.4 who was the Circle Inspector of Police, Central Police Station, Ernakulam, coupled with Ext. D10 complaint register will clearly show that the complainant as well as accused were not on good terms during the relevant period which is prior to 27-12-1999. If so, the version of the complainant that all the cheques were issued on 27-12-1999 is absolutely false. The accused examined as D.w.1 has categorically stated before court that at the time of P.W.1 issuing the statutory notice, the accused was not in station due to the threat caused by the complainant. He was, therefore, not aware of the arrival of any postal article in his address. D.W.3 the father of the accused has categorically stated that no intimation of any notice was given to him by the postman. Even without proving the issue of intimation, it was not open to the complainant to press into service the presumption under Section 27 of the General Clauses Act. In **Chacko v. Kurian - 2006 (3) KLT 694** it has been held that for the purpose of deemed service, issuance of intimation is necessary. In this case, the burden to show that there is no proper service of notice was on the complainant who has not discharged the same.

4. I am afraid that I cannot agree with the above submissions. Of course, the courts below were not quite right in holding that the accused has a grievance that the cheques

in question were got executed under duress with the involvement of the police. Exts.D3 to D 10 and the testimonies of the defence witnesses would only prove that from 23-10-1999 onwards the accused and his parents were lodging complaints before the police against the complainant. Even assuming that from 23-12-1999 the relationship between the accused and the complainant was strained , that does not improbabilise the case of the complainant that he advanced Rs. 30,000/- on 23-4-1999, Rs. 1,00,000/- on 25-4-1999 and Rs. 50,000/- each on 16-6-1999 and 17-6-1999 to the accused. All the above dates are prior to 23-10-1999 which is the date of commencement of the alleged estrangement between the accused and the complainant. No doubt, all the four cheques are evidently postdated cheques. Ext. P1 cheque dated 27-12-1999 is for Rs. 2,00,000/-. Ext.P7 cheque dated 21-1-2000 is for Rs. 30,000/-, and Ext.P13 and P19 cheques dated 5-1-2000 and 13-1-2000 are each for Rs. 50,000/-. Admittedly, both the accused and the complainant were having their own business and both of them were known to each other for the past three years. According to the complainant, the accused used to borrow money from the complainant for the purpose of his textile shop at Convent Road Junction. The specific case of the accused is that as offered by the complainant who is engaged in real estate business, he started acting as the agent of the complainant for mobilising funds for the moneylending business of the complainant and the

complainant promised to give him 5% commission. The further case of the accused examined as D.W.1 is that he was instrumental for getting C.T. George (DW2) a Contractor of Cochin Shipyard to the complainant for advancing a loan of Rs. 1,30,000/-, another loan of Rs. 30,000/- and yet another loan of Rs. 1,00,000/- at 29% interest and the commission offered to the accused was 5%. D.W.1 would further say that he had procured yet another person by name K.R. Sajeevan to whom also 50,000/- rupees each was advanced by P.W.1 on two occasions. D.W.1 would have it that when the aforementioned loans were advanced to C.T. George and K.R. Sajeevan it was the accused (DW1) who gave his blank cheques to P.W.1 by way of security and P.W.1 was misusing those blank cheques to file these complaints. First of all, the accused when examined under Sec. 313 (1)(b) Cr.P.C. had no case that he did not issue the cheques in question as alleged or that what he had given to P.W.1 was blank cheques as security for C.T. George and K.R. Sajeevan. If C.T. George and K.R. Sajeevan were the loanees to whom the complainant had advanced amounts through the instrumentality of the accused acting as an agent, it does not stand to reason as to why the accused should give blank cheques to the complainant by way of security. It was for the loanees to offer security in the event of their default. Hence, the defence set up by the accused is an inherently improbable story. When admittedly the four cheques relate to the account held by the

accused and admittedly those cheques were entrusted by the accused to the complainant, the case of the complainant in this regard is more probable. The trial Magistrate who had the unique advantage of seeing the witnesses and assessing their credibility was not inclined to accept the defence evidence but instead was inclined to accept the evidence tendered by he complainant. The lower appellate court has also endorsed the views of the trial Magistrate in this regard. If so, this court sitting in the rarefied revisional jurisdiction will be loathe to interfere with the said finding on fact. The conclusion was rightly entered against the revision petitioner.

5. Equally misconceived is the argument based on notice. The self interested testimony of the accused and his father cannot be accepted to hold that at the time of the statutory notice, the accused was not residing in his address.

6. What now survives for consideration is the question regarding the adequacy or otherwise of the sentence imposed on the revision petitioner. Even according to the complainant, the total amount borrowed by the accused was only Rs. 2,30,000/-, whereas Exts. P1, P7, P13 and P19 cheques cover a total amount of Rs. 3,30,000/-. It is by including the exorbitant and usurious interest that the complainant secured the above cheques from the accused. Considering all these circumstances, I am of the view that the complainant cannot permitted to misuse the process of the criminal court to make an unjust enrichment.

Accordingly, in C.C.223 of 2000, the revision petitioner shall undergo simple imprisonment till the rising of the court and shall pay a compensation of Rs. 1,00,000/-, under Section 357 (3) Cr.P.C., in C.C. 291 of 2000 the revision petitioner shall undergo simple imprisonment till rising of court and shall pay a compensation of Rs. 30,000/- to the complainant under Sec. 357 (3) Cr.P.C. and in C.C. Nos. 292 and 293 of 2000, the revision petitioner shall undergo simple imprisonment till the rising of court and shall pay to the complainant a sum of Rs. 50,000/- each as compensation under Sec. 357 (3) Cr.P.C. The compensation amount shall be paid within four months from today failing which the revision petitioner shall suffer simple imprisonment for three months for each of the defaults. The sentence of imprisonment till rising of court shall run concurrently.

In the result, these revisions are disposed of confirming the conviction entered against the revision petitioner but modifying the sentence as above.

V. RAMKUMAR, JUDGE.

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